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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1981

No._____

WASHINGTON STATE DEPARTMENT OF REVENUE,

Petitioner,

v.

J. K. WOFFORD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

QUESTION PRESENTED

May a State impose its general use tax, which is complementary to its general retail sales tax, upon the off-reservation use of a motor vehicle by a reservation Indian when that motor vehicle, though purchased on the reservation, is used both on and off the reservation?

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The petitioner, Department of Revenue of the State of Washington, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Washington, Division II, entered in this proceeding on December 30, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 28 Wn.App. 68, 622 P.2d 1278, and appears in Appendix A hereto. The order of May 8, 1981 by the State Supreme Court, denying the Department of Revenue's Petition for Review from the decision of the Court of Appeals, is reported at 95 Wn.2d 1018.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1980, reversing the Superior Court's denial of the respondent's Motion for Summary Judgment. The Court of Appeals denied a timely petition for reconsideration by order entered February 23, 1981. A timely Petition for Review was filed in the Washington State Supreme Court, which was denied by order entered on May 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, TREATY, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

United States Constitution, Article VI (Supremacy Clause); Treaty with the Yakimas, 12 Stat. 951 (1855), Articles II and III. (The above provisions are set forth in Appendix C hereto.)

Wash.Rev.Code §§ 82.08.010(1), 82.08.020, 82.08.050, 82.12.010(1) and (2), 82.12.020, 82.12.030(2), 82.12.040. Wash. Admin.Code §§ 458-20-178 and 458-20-192. (The above provisions are set forth in Appendix D hereto.)

STATEMENT OF THE CASE

1. Washington's Sales and Use Tax System.

Washington's sales and use tax system follows the familiar national pattern.[1] The sales tax is imposed upon the retail sale of tangible personal property, at a statutorily specified rate (currently 4.5%) which is applied to the selling price. Wash.Rev.Code, § 82.12.020. The tax is to be paid by the buyer to the seller, who, in turn, is to remit it to the State. Wash.Rev.Code § 82.08.050.

The use tax is imposed upon the use of tangible personal property which has not been subjected to the sales tax. Wash.Rev.Code § 82.12.020 and 82.12.030(2). The rate is the same as the sales tax rate, Wash.Rev.Code 82.12.020, and is applied the value of the personal property being used, which is usually the selling price. Wash.Rev.Code § 82.12.010(1). And as with the sales tax, a seller engaged in business in the State is required to collect the tax from the buyer, and remit it to the State, if the property is acquired through a sale.[2]

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[1]All but five states impose a general sales and use tax. See, All States Tax Guide, Prentice Hall, ¶ 210 (1981).

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[2]The relationship between the sales tax and the use tax is summarized in Wash.Admin.Code 458-20-178;

> "The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail or acquired by lease, gift, or bailment, or extracted, produced or manufactured by the person so using the same, where the user, donor or bailor has not paid retail sales tax under chapter 82.08 RCW with respect to the sale to him of the property used.
>
> "In general, the use tax applies upon the use of any tangible personal property, the sale of acquisition of which has not been subjected to the Washington retail sales tax. Conversely, it does not apply upon the use of any property if the sale to the user or to his donor or bailor has been subjected to the Washington retail sales tax, and such tax paid thereon. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon the sale or use of all tangible personal property, irrespective of where it may have been purchased or how acquired."

If the seller fails to collect the use tax or, having collected it, fails to remit it to the State, he is personally liable to the State. Wash.Rev.Code 82.12.040. The same is true with respect to the sales tax as well. Wash.Rev.Code 82.08.050.

2. The Events Giving Rise to This Litigation.

During 1973, the respondent, Mr. J. K. Wofford, owned and operated an auto repair and used car business in the city of Wapato, Washington. Wapato is located within the exterior boundaries of the Yakima Indian Reservation. The respondent is neither an Indian nor a licensed Indian trader. In the course of his business, however, Mr. Wofford sold automobiles to enrolled members of the Yakima Indian Nation.

These automobiles were registered and licensed by the State of Washington at the time of sale and delivery. Mr. Wofford did not remove the state license plates from the automobiles sold to members of the Yakima Indian Nation. The automobiles so licensed were to be used both on and off the reservation.

Mr. Wofford also made repairs to licensed automobiles owned by enrolled members of the Yakima Indian Nation. But he collected neither a sales nor use tax on either these automobile sales or on the repairs.

Following audit, the Department of Revenue issued its assessment in the amount of $972.00, plus interest and penalties. Of this $972.00, $884.00 covered the automobiles sold to members of the Yakima Tribe, and the rest, $88.00, covered repairs to automobiles owned by tribal members.

3. How the Federal Question Was Raised.

Upon payment of the assessment in full, the respondent filed a notice of appeal to the Thurston County Superior Court, requesting a refund. The federal question here presented was first raised in that notice of appeal, in which the respondent stated:

> "The collection of sales tax in this situation is illegal in that such Indians are exempt from paying such taxes under the Constitution of the United States and under

WAC 458-20-192 as it read in 1973." (Clerk's Papers ("CP") 1.)

The respondent's legal position was set out in more detail in his memorandum in support of his motion for summary judgment. (CP 13-19, at 15).

> "The State of Washington recognizes that Indians and Indian tribes are not subject to the state sales tax for purchases of tangible personal property and services within an Indian reservation. See WAC 458-20-192 (hereinafter called Rule 192). Rule 192 goes on to state that Indians and Indian tribes are not subject to the use tax for the use of tangible personal property within an Indian reservation. This position is consistent with the present status of the law, which provides that reservation Indians are not subject to state taxes. However, when motor vehicles sold to Indians or Indian tribes are licensed at the time of sale, Rule 192 requires the collection of a use tax. The justification recited in Rule 192 is that such motor vehicles are presumed to be operated on the highways of the State of Washington outside the reservation, and therefore, such Indians are subject to the use tax.[3]
>
> "Plaintiff [respondent] contends that even though a purchased vehicle is licensed and used occassionally [sic] off the reservation, the State of Washington has no jurisdiction to impose a use tax on purchases by enrolled members of the Yakima Indian Nation, who reside on the Yakima Indian Reservation and take delivery thereon."

In support of this contention, the respondent relied upon *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the*

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[3]This synopsis by the respondent of Rule 192 is correct. (See Appendix D). It shows, however, that the respondent's original reliance on Rule 192 was misplaced. The respondent, it should also be noted, did not contend at any time that the state use tax did not apply to off-reservation use as a matter of state law. And any such contention would be contrary to the long-standing administrative construction embodied in Rule 192. The respondent did, however—though only at the Court of Appeals level—contend that the original assessment, which was predicated upon a sales tax theory, could not be defended upon a use tax theory. The Court of Appeals did not rule on this contention, but went directly to the federal question. See, 28 Wn.App. at 69, n. 1.

Colville Indian Reservation, 446 F.Supp. 1339 (D.C. E.D. Wa. 1978) which had just been decided by the three-judge District Court. (CP 16-18.) In *Moe*, this Court had invalidated the Montana property tax, as applied to motor vehicles used by reservation Indians both on and off the reservation; and in *Colville*, the District Court had invalidated the Washington motor vehicle excise tax as applied to motor vehicles similarly used.

The Superior Court rejected the respondent's contention, finding that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) was controlling, rather than *Moe* and *Colville*, and that, under *Mescalero*, a State could tax off-reservation use of automobiles owned by reservation Indians. (CP 33-36.)

On appeal to the Court of Appeals, the Court of Appeals reversed stating:[4]

> "* * * the [State Revenue] Department's argument would seem to be directly contrary to the Supreme Court's admonition in Colville that 'something more than mere nomenclature' must be varied (citation omitted). Accordingly, Colville controls the disposition of this case." 28 Wn.App. 68, at 71.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an unsettled question of federal law, of great importance to all States which, like Washington, have a sales and use tax system and which, also like Washington, contain Indian reservations.[5] Indeed, after the development brought about by the recent decisions of this Court in the area of Indian immunity from state taxation, the question presented in this case may well be one of the few major questions as yet unsettled in this area.

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[4]This Court's decision in *Colville*, 447 U.S. 134 (1980) had been rendered by then.

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[5]Of the five states which do not impose a general sales and use tax, three contain Indian reservations. These are Alaska, Montana, and Oregon. See, ¶ 210, All States Tax Guide, n. 1, *supra*. Except for the reservations in these three states, then, all Indian reservations are within a state imposing a general use tax.

A brief tracing of the various steps in that development will show how this case fits in. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), which might be viewed as the first step, two related principles were established. Absent Congressional legislation to the contrary, state tax laws apply to the activities and property of reservation Indians *outside* (*Mescalero*), but not *inside* the reservation (*McClanahan*). Thus, in the context of the present problem, a state use tax would apply to the use of personal property which takes place entirely outside the reservation; but it would not apply to the use of personal property which takes place entirely within the reservation. That, we believe, is definitively settled.

Moe might be viewed as the second step. *Moe* held that the on-reservation immunity established in *McClanahan* did not extend to non-Indian customers of on-reservation Indian businesses and further did not immunize those Indian businesses themselves from collecting and paying over to the State those taxes upon the non-Indian customers. 425 U.S. at 481-483

Moe also held that an annually recurring property tax could not be imposed on automobiles owned by a reservation Indian, even when the automobile was used both on and off the reservation. The Court thus established that *McClanahan*, rather than *Mescalero*, applies in that situation. 425 U.S. at 480

Colville might be viewed as the third step, further clarifying both holdings in *Moe*. *Colville* established that the first holding in *Moe* was applicable even when the Tribe itself imposed a tax upon the non-Indian customer of an on-reservation Indian business, and that the usual state enforcement procedures could normally be utilized in enforcing the Indian's obligation to collect and remit the state tax. 447 U.S. at 150-162

Even more importantly for present purposes, *Colville* also applied and clarified the second holding in *Moe*. *Moe* involved the Montana personal property tax, while *Colville* involved the Washington motor vehicle excise tax. And, in *Colville*, the precise question was whether this annually

recurring excise tax on motor vehicles, assessed at a percentage of the vehicle's market value, should be treated as the equivalent of another type of annually recurring tax likewise assessed at a percentage of the vehicle's market value, *i.e.*, the property tax involved in *Moe*. The Court in *Colville* held that the two types were indeed practical equivalents, finding the distinction between the property tax and the motor vehicle excise tax to be merely one of nomenclature, affording no legal difference. As stated in *Colville*:

> "The vehicles Montana attempted to tax were apparently used both on and off the reservation, *and the tax was assessed annually at a percentage of market value of the vehicles in question*. Thus, the only difference between the taxes now before us and the one struck down in Moe is that these are called excise taxes and imposed for the privilege of using the vehicle in the State, while the Montana tax was labelled a personal property tax." 447 U.S. at 163 (emphasis supplied) (footnote deleted).

And again:

> "Had Washington tailored its tax to the amount of actual off-reservation use, *or otherwise varied something more than the mere nomenclature*, this might be a different case." *Id.* at 163-164 (emphasis supplied).

This case presents the question suggested but left unanswered in *Colville*. Is a general use tax imposed upon the off-reservation use of an automobile owned by a reservation Indian and used both on and off the reservation a "different case"?[6] Is the difference more than one of "mere nomenclature"? We believe that it is.

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[6]The question here presented, of course, is part of a larger problem. To what extent does the on-reservation immunity of an Indian as established in *McClanahan*, remain with the Indian when he is *off* the reservation?

Though the question in this case arises in the context of a use tax, the general problem could arise in the context of other types of taxes as well. For example, if an Indian lives on the reservation, but works off the reservation, is he immune from a state income tax on his off-reservation wages? And is he immune in the reverse situation, in which he resides off

The use tax is imposed, as is its practical equivalent, the sales tax, only once. The Court of Appeals failed to grasp this decisive difference between annually recurring taxes based on the value of the property on the one hand, and non-recurring excise taxes (such as sales and use taxes) on the other.[7]

The consequences of failing to observe this difference are what gives this case such practical importance. Reservation Indians can—and do—readily avoid a sales tax. They need simply have the sale completed on the reservation, by having the goods delivered there. This is very easy with most tangible personal property, and even easier, of course, with automobiles. And in such a case, we agree, *McClanahan* would apply, so as to immunize the sale.[8] If the property remains on the reservation, and is used

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the reservation, but works on the reservation? *Cf., Dillon v. Montana*, 451 F.Supp. 168 (D.C. Mont. 1978), rev'd on jurisdictional grounds, 634 F.2d 463 (9th Cir. 1980). The tension between *McClanahan* and *Mescalero* in situations such as these remains to be resolved by the Court.

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[7]This difference on which we rely is exactly the same as that relied on in *Sullivan v. United States*, 395 U.S. 169 (1969), in which the Court held that the imposition of a state sales or use tax on servicemen's automobiles did not violate the provisions of the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. 574. In so holding, the Court distinguished *California v. Buzard*, 382 U.S. 386 (1966) which had struck down a California tax indistinguishable from the Washington motor vehicle excise tax. As stated in *Sullivan*;

> "The Court held in Buzard that § 514 [50 U.S.C. App. § 574] exempted servicemen from the California tax on automobiles, not because it *was* an excise tax on use covered by subsection (2)(b), but rather because it was *not* such a tax. The so-called 'license fee' there in question as an annual tax in the amount of 2% of the assessed market value of the car—a levy which was indistinguishable from the annually recurring ad valorem taxes that § 514 was designed to cover." 395 U.S. at 182 (footnotes deleted) (emphas in the original).

And, as the Court stated in footnote 38;

> "Indeed, the Court in Buzard emphasized that the tax had been adopted by California 'as a substitute for local ad valorem taxation of automobiles." *Id.*, at 182, n. 38.

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[8]And that is precisely why this is a use tax case, rather than a sales tax case. Here the sales did take place on the reservation.

exclusively there, *McClanahan* would apply once again, so as to immunize the property from any use tax as well. This result is essentially no different from that in the interstate setting; if property is delivered outside the state and continues to be used only there, neither the sales nor the use tax apply.

But Washington, along with most other states, has adopted the policy that should property come into its taxing jurisdiction, those using that property must pay a tax equivalent to that paid by everyone else with similar property within its taxing jurisdiction, *i.e.*, a use tax which is the practical equivalent of the sales tax.[9]

The Court of Appeals decision completely frustrates that important state policy. It also, we suggest, completely frustrates the important federal policy underlying this Court's decision in *Mescalero, i.e.*, that there should be tax equality between Indians and non-Indians when the Indians move outside the reservation boundaries. See 411 U.S. at 151-154. For under the Court of Appeals decision, having the personal property delivered to the reservation, and having the initial use of the property occur there will immunize the Indian from ever having to pay the same tax burden that has already been paid by the non-Indians, even when the Indian moves off the reservation. That result upsets the off-reservation tax equality between Indians and non-Indians established in *Mescalero*.

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[9]The use tax involved here is not "tailored to the amount of actual off-reservation use * * *" *Colville*, 447 U.S. at 163. But a non-recurring general use tax, which is complementary to a general sales tax, must be measured, like the sales tax itself, by the full value of the property. Thus, completely apart from the obvious administrative problems, it cannot be based upon the amount of actual use within the taxing jurisdiction.

CONCLUSION

For the reasons given above, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[No. 3958-II. Division Two. December 30, 1980]

J. K. WOFFORD, *Appellant*, v. THE DEPARTMENT OF REVENUE, *Respondent*.

REED, C.J.—J. K. Wofford appeals a summary judgment order dismissing his action for a tax refund. We reverse.

The facts of this case are undisputed. J. K. Wofford, neither an Indian nor licensed Indian trader, operates a used car business and garage in Wapato, which is located within the Yakima Indian Reservation. During 1973 Wofford sold used cars and trucks licensed by the State of Washington to members of the Yakima Indian Tribe. Wofford also made repairs to licensed vehicles owned by tribal members. The vehicles were used both on and off the Indian reservation.

Wofford collected neither a sales nor use tax on these sales or repairs. After an audit the Department of Revenue assessed a retail sales tax of $972 against Wofford. Wofford paid the assessment along with $346 in interest and then brought this action for a refund, contending that the State had no jurisdiction to assess any tax against vehicles owned by Indians and used at least partially on the reservation. After commencement of this action the Department of Revenue retreated from its position that the assessment represented a retail sales tax, but urged that the assessment should be upheld as a use tax.[1] The trial court granted summary judgment for the Department of Revenue on the basis of a use tax. Wofford appeals.

This appeal raises yet again "the intricate problem of state taxation of matters involving Indian tribes and their members." *Washington v. Confederated Tribes of the Col-*

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[1]Both parties have devoted portions of their briefs to the effect of the assessment being initially labeled a "retail sales tax." Because we believe that under the decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ___ U.S. ___, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980), discussed *infra*, the tax cannot be upheld regardless of its label, we need not discuss this issue.

ville Indian Reservation, ___ U.S. ___, 65 L. Ed. 2d 10, 19, 100 S. Ct. 2069, 2073 (1980). Fortunately, our examination of this "vexing area" need not extend beyond the United States Supreme Court's recent decision in *Colville*. In *Colville* the Supreme Court struck down as applied to Indians a Washington motor vehicle excise tax, RCW 82.44.020, imposed on "the privilege of using in the state any motor vehicle". Relying on *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 48 L. Ed. 2d 96, 96 S. Ct. 1634 (1976), which held that under the supremacy clause of the constitution Montana's personal property tax could not be applied to vehicles owned by tribal members and used both on and off the reservation, the Supreme Court in *Colville* held at 65 L. Ed. 2d 35-36:

> While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what Moe held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.

In so holding, the court rejected the State's argument made in reliance on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973), which acknowledged a state's authority to tax tribal activities conducted outside the reservation. The Department of Revenue embraces the same position in this case that it took in *Colville*. The Supreme Court's rejection of that position necessarily dictates that it be rejected in this court.

The Department further contends, however, that *Colville* can be distinguished because *Colville* involved an excise tax, while this case involves use tax. For authority the Department relies on *Sullivan v. United States*, 395 U.S. 169, 23 L. Ed. 2d 182, 89 S. Ct. 1648 (1969). *Sullivan* involved an interpretation of section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USCA App. § 574, which exempts military personnel from certain state taxes. We believe *Sullivan* is inapposite. First, *Sullivan* did not involve the unique issue of state taxation over Indians.

Moreover, as we read *Sullivan*, that case merely draws a distinction between a use tax and a property tax, not between an excise tax and a use tax. *Sullivan v. United States, supra* at 181-83. Generally, use taxes have been considered as a form of excise tax. 68 Am. Jur. 2d *Sales and Use Taxes* § 172 (1973). Further, the Department's argument would seem to be directly contrary to the Supreme Court's admonition in *Colville* that "something more than mere nomenclature" must be varied 65 L. Ed. 2d at 36. Accordingly, *Colville* controls the disposition of this case.

Judgment is reversed and remanded for entry of an order granting plaintiff's motion for summary judgment.

PEARSON and PETRIE, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

J. K. WOFFORD,

Plaintiff,

VS.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Defendant.

MEMORANDUM OPINION

This case was before this Court on a motion for summary judgment by the plaintiff for a refund of state use taxes paid by plaintiff. It is agreed that the facts are not in dispute and that summary judgment is appropriate if the Court is persuaded that the law on the subject favors the plaintiff.

The agreed facts indicate that the plaintiff is the operator of a used car business and garage in Wapato which is a city located in this state, but totally within the confines of the Yakima Indian Reservation. The plaintiff is not an Indian nor is he a licensed Indian trader.

During the year 1973 the plaintiff sold used cars and trucks to members of the Yakima Indian Tribe. At the time of the sale and delivery these vehicles were licensed by the State of Washington. However, the plaintiff did not collect and remit to the Department of Revenue any sales or use tax on these particular sales. In addition, the plaintiff made repairs to licensed vehicles owned by members of the Yakima Tribe and did not collect or remit sales and use tax monies received for these services. After audit by the Department of Revenue, the plaintiff paid the total assessments and brought this action for refund of the amounts paid. Simply put, the issue is as follows: Can the State of Washington require a non-Indian retailer of vehicles to collect use taxes on sales of vehicles and repair parts to members of the Yakima Nation where the vehicles

are delivered on the Yakima Indian Reservation and licensed by the State at the time of delivery?

This Court answers that question in the affirmative. In ruling on the issue, the Court is mindful of the fact that recent cases from the United States Supreme Court have greatly restricted the ability of a State to impose a tax on property of Indians which is located on an Indian Reservation. In *McClanahan v. State Tax Comm. of Arizona* 93 S. Ct. 1257 (1973) the Court decided that the State of Arizona had no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation when their income was derived wholly from reservation sources. The case of *Bryan v. Itasca County, Minnesota* 96 S. Ct. 2102 (1976) saw the high court hold that the State of Minnesota and one of its counties, could not impose a personal property tax on a mobile home located on Indian Reservation Lands. *Moe v. Confederated Salish & Kootenai Tribes* 96 S. Ct. 1634 (1976) stands for the proposition that a state may not impose a personal property tax on personal property located within the reservation and owned by Indians nor can it collect cigarette sales taxes on reservation sales by Indians.

What distinguishes the instant case is that the tax sought to be imposed here is a use tax which is a tax imposed only on the privilege of using the vehicles in question on the roads of the State of Washington. This "use" must by necessity occur off the reservation and thus is a tax on off-reservation activity. While the cases cited above clearly indicate that, absent cession of jurisdiction or other federal permission, states may not tax property of Indians within Indian Reservations, Indian lands or activities carried on within the boundaries of the reservation, they do not apply to this case. This was pointed out by Justice White in the case of *Mescalero Apache Tribe v. Jones* 93 S. Ct. 1267 (1973) as follows:

> "* * * tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation bound-

aries have generally been held subject to non-discriminatory state law often applicable to all citizens of the State."

It seems, therefore, to this Court, that the use tax sought to be imposed is appropriately assessed. Certainly, in cases where an Indian does purchase an automobile in similar circumstances, but, does not intend to use it within the State of Washington, it would not be appropriate to collect the use tax. However, in those cases, the purchasers need not purchase a Washington license since there would be no need for the license. In this case, the tax has only been collected in cases where a Washington license has been obtained. It seems reasonable to the Court, particularly considering the fact that the Yakima Indian Reservation is entirely located within the State of Washington, that a Reservation Indian purchasing a Washington automobile license plate for an auto purchased on the reservation intends to exercise the privilege of driving it on the non-reservation highways of this State. If so, he or she should be subject to the use tax as are other citizens of this State.

Plaintiff's argue that a use tax is really just a property tax and in the *Mescalero* case, *supra*, the Court stated that "use is among the bundle of privileges that make up property or ownership of property." However the Court went on to state that "This is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes."

In the *Mescalero* case, *supra*, the Court found that the particular use tax which was imposed on personal property installed on ski lifts was so intimately connected with the use of land which was relieved of the tax burden that the Court could construe an exemption from the use tax because, in their words, "every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements." I do not believe that the Supreme Court would have held in that case that a use tax should not be assessed and paid for personalty, not affixed to the tax exempt land. The rationale of that case does not apply and therefore, this Court concludes that this tax is properly

assessible and collectible in these circumstances. The Court concludes further that it is within the authority of the Department of Revenue to require non-Indian sales of such vehicles to precollect the use tax at the time of delivery of a *licensed* vehicle to an Indian purchaser.

For reasons stated in this memorandum opinion, the Court will deny plaintiff's motion for summary judgment. Upon presentment, I will sign an appropriate order.

Dated at Olympia, Washington this 11th day of August, 1978.

/s/_____

GERRY L. ALEXANDER, JUDGE

APPENDIX C

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Constitution of the United States of America Article VI—Supremacy Clause

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Treaty with the Yakimas, 12 Stat. 951 (1855)

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the

superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways. * * *

APPENDIX D

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

(Chapter 82.08 Wash. Rev. Code—Sales Tax)

82.08.020 Retail sales tax imposed. There is levied and there shall be collected a tax on each retail sale in this state equal to four and one-half percent of the selling price: *Provided,* That from and after the first day of * * *

82.08.010 Definitions. For the purpose of this chapter:

(1) "Selling price" means the consideration, whether money, credits, rights, or other property, expressed in the terms of money paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer; and shall be subject to modification to the extend modification is provided for in RCW 82.08.080.

* * *

82.08.050 Buyer to pay, seller to collect tax—— Penalties. The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a gross misdemeanor.

In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the department

in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

* * *

(Chapter 82.12 Wash. Rev. Code—Use Tax)

82.12.020 Use tax imposed. There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280, subsections (2) or (7). This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state. This tax shall not apply to the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state. Except as provided in subdivision (2) of RCW 82.12.030, payment by one purchaser or user of tangible personal property of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property from the taxes imposed by such chapters. The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate of four and one-half percent: * * *

82.12.010 Definitions. For the purposes of this chapter:

(1) "Value of the article used" shall mean the

consideration, whether money, credit, rights, or other property, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter.

(2) "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state;

82.12.030 Exemptions. The provisions of this chapter shall not apply:

(2) In respect to the use of any article of tangible personal property purchased at retail or acquired by lease, gift or bailment if the sale thereof to, or the use thereof by, the present user or his bailor or donor has already been subjected to the tax under chapter 82.08 or 82.12 RCW and such tax has been paid by the present user or by his bailor or donor; * * *

82.12.040 Retailers to collect tax——Penalty. Every person who maintains in this state a place of business or a stock of goods shall obtain from the department a certificate of registration, and shall, at the time of making sales, or making transfers of either possession or title or both, of tangible personal property for use in this state, collect from the purchasers or transferees the tax imposed under this chapter. For the purposes of this chapter, the phrase "maintains in this state a place of business" shall include the solicitation of sales and/or taking of orders by sales agents or traveling representatives.

* * *

The tax required to be collected by this chapter shall be deemed to be held in trust by the retailer until paid to the department and any retailer who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax provided herein to the extent that the money required to be collected is not available for

payment on the due date as prescribed shall be guilty of a misdemeanor. In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay the same to the department in the manner prescribed, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall nevertheless, be personally liable to the state for the amount of such tax.

(Administrative Provisions)

WAC 458-20-192 (Rule 192) Indians — Indian Reservations. Use Tax. Indians are not subject to the use tax upon the use of tangible personal property in an Indian reservation. However, Indians will become liable for the use tax when any such property is placed into actual use outside the reservation, irrespective of the fact that the first use of the property may have been within the reservation.

SPECIAL APPLICATION OF RETAIL SALES TAX AND USE TAX WITH RESPECT TO SALES OF MOTOR VEHICLES AND TRAILERS TO INDIANS. When motor vehicles and trailers sold to Indians are licensed by the State of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles and trailers are for use on the highways of the State of Washington. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance where delivery is made outside an Indian reservation, and to collect the use tax in every instance where delivery is made by the dealer within an Indian reservation. County Auditors must collect the use tax when Indians apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle by the applicant.

(Effective July 1, 1970; this language, however, was first adopted March 1, 1954. See Rules relating to the Revenue Act, pp 116, 117, March 9, 1954.)

WAC 458-20-178 (Rule 178) Use tax. NATURE OF THE TAX. The use tax supplements the retail

sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail or acquired by lease, gift, or bailment, or extracted, produced or manufactured by the person so using the same, where the user, donor or bailor has not paid retail sales tax under chapter 82.08 RCW with respect to the sale to him of the property used.

In general, the use tax applies upon the use of any tangible personal property, the sale of acquisition of which has not been subjected to the Washington retail sales tax. Conversely, it does not apply upon the use of any property if the sale to the user or to his donor or bailor has been subjected to the Washington retail sales tax, and such tax paid thereon. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon the sale or use of all tangible personal property, irrespective of where it may have been purchased or how acquired.

WHEN TAX LIABILITY ARISES. Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which the taxpayer takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state. Tax liability arises as to that use only which first occurs within the state and no additional liability arises with respect to any subsequent use of the same article by the same person. As to lessees of tangible personal property who have not paid the retail sales tax to their lessors, liability for use tax arises as of the time rental payments fall due and is measured by the amount of such rental payments.

(Effective July 1, 1970.)

Opposition

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FILED
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No. 81-309

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

WASHINGTON STATE DEPARTMENT OF REVENUE,
Petitioner,

vs.

J. K. WOFFORD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Washington Division II

BRIEF OF THE RESPONDENT, J. K. WOFFORD, IN OPPOSITION

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BRIEF OF THE RESPONDENT, J. K. WOFFORD, IN OPPOSITION

I.

QUESTION PRESENTED

May the State of Washington impose its general use tax on enrolled members of an Indian Nation who reside within their Treaty designated reservation, for the on-reservation purchase of a motor vehicle licensed for

use on highways both on and off the reservation and which may occasionally be used off the reservation?

II.

CONSTITUTION AND TREATY PROVISIONS INVOLVED

The respondent adopts those set forth in the Petition for Writ of Certiorari except respondent would add:

A. Constitutional Provision:

1. Article I, Section 8, Clause 3:

> "To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

III.

STATEMENT OF THE CASE

A. Factual Introduction.

During 1973, Mr. J. K. Wofford, the respondent herein, owned and operated an auto repair and used car business in the City of Wapato, Washington. Wapato is located entirely within the boundaries of the Yakima Indian Reservation. In the course of his business, Mr. Wofford sold motor vehicles to enrolled members of the Yakima Indian Nation who resided within the reservation.

These motor vehicles were licensed and registered by the State of Washington at the time of sale and delivery. Mr. Wofford did not collect a sales or use tax

from the reservation members of the Yakima Indian Nation to whom he sold the motor vehicles. Nor did he remove the state license plates. Upon his delivery of the motor vehicles, they were licensed for use both on and off the reservation.[1]

Mr. Wofford also repaired motor vehicles owned by reservation members of the Yakima Nation without collecting a sales or use tax. Thereafter, his records were audited and the Washington Department of Revenue determined that Mr. Wofford should have collected a sales tax from the Yakima Nation members to whom he sold the licensed motor vehicles and for whom he repaired motor vehicles, even though they were residing upon the reservation and the sale occurred within the reservation. Mr. Wofford then received a sales tax assessment[2] which he paid. Shortly thereafter, Mr. Wofford commenced litigation seeking a refund of taxes which he was required to pay.

B. **Lower Court Decisions.**

In the initial round of this litigation, the Thurston County Superior Court ruled that the taxes paid by

---

[1] For purposes of this litigation, the respondent agreed with the presumption set forth in Wash. Admin. Code 458-20-192 that vehicles licensed by the State of Washington at the time of sale would be used on the highways of the State of Washington. The respondent also agreed that such vehicles would occasionally be used on the highways of the State of Washington which lie outside the Yakima Indian Reservation.

[2] Subsequent to the issuance of the written sales tax assessment, the Washington Department of Revenue has sought to sustain its validity as a use tax.

Mr. Wofford were properly imposed use taxes. The Superior Court found *Mescalero Apaches Tribe v. Jones*, 411 U.S. 145 (1973) to be controlling. The Superior Court did not properly construe or consider this Court's opinion in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In paying only lip service to *Moe*, the Superior Court stated:

> "*Moe v. Confederated Salish and Kootenai Tribes*, 96 S.Ct. 1634 (1976) stands for the proposition that a state may not impose a personal property tax on personal property located within the reservation and owned by Indians nor can it collect cigarette sales taxes on reservation sales by Indians." (See Appendix B-2 to Petition).

This construction of *Moe* by the Superior Court was clearly erroneous. The Superior Court did not consider that the personal property (motor vehicles) Montana sought to tax was used both on and off the reservation. Furthermore, the Superior Court completely misread *Moe* as it related to the collection of cigarette sales taxes. It is fair to say that the judgment of the Superior Court merits very little standing in this Court.

On receipt of the judgment from the Superior Court, Mr. Wofford appealed this matter to the Court of Appeals. The Court of Appeals reversed the erroneous judgment of the Superior Court and found *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) to be controlling. The Washington Supreme Court signified its agree-

ment with the decision of the Court of Appeals when it denied a Petition for Review.

IV.

ARGUMENT WHY THE WRIT SHOULD NOT BE GRANTED

This case simply does not present a federal question which merits further review by this Court. The argument that occasional off-reservation use of a motor vehicle by a reservation Indian subjects him to the imposition of some form of state taxation has been previously rejected by this Court in both *Moe* and *Colville*.

This Court in *Moe* and *Colville* has clearly established the well-founded principal that states, including Washington, are pre-empted and therefore precluded from imposing taxes on Indian people, residing on their reservation, for their ownership or use of a motor vehicle even if the vehicle is occasionally used off the reservation. This Court has held that a case of this nature is controlled by the principals found in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). *McClanahan* provides that states must demonstrate Congressional consent before taxation of reservation Indians will be permitted. The Washington Department of Revenue cannot point to any Congressional consent to the imposition of a use tax on reservation members of the Yakima Nation for their occasional use of vehicles off the reservation. Without such consent, this

case is controlled by *McClanahan*, *Moe* and *Colville*. The *Mescalero* case which involved a tax on property permanently located off the reservation would have no bearing.

The Washington Department of Revenue buttresses its argument by pointing to a statement of this Court found in *Colville:*

> "Had Washington tailored its tax to the amount of actual off reservation use, or otherwise varied something more than the mere nomenclature, this might be a different case." 447 U.S. at 163-164.

Respondent contends this statement has no bearing in the present case. Washington has *not* tailored its use tax to the amount of actual off-reservation use. In spite of this, Washington argues that this is a tax which presents a different case. That something more than mere nomenclature is varied. Washington argues that the decisive difference which removes this case from the control of *Moe* and *Colville* is that the use tax is a non-recurring excise tax as opposed to recurring taxes struck down in *Moe* and *Colville*.

Whether an excise tax is recurring or not is not determinative of its lawfulness as applied to reservation Indians. The inquiry must focus on federal preemption anlysis and whether there exists congressional consent to the application of a state tax to reservation Indians. Washington concedes that the non-recurring sales tax cannot be imposed on a reservation Indian

for sales transactions occurring on the reservation. Such sales taxes are clearly improper and reservation Indians are immune from them because of the federal pre-emption principals set forth in *McClanahan.*

Can the principals of federal pre-emption as to the taxation of reservation Indians be totally circumvented by the occasional leaving of the reservation by a reservation Indian? The respondent submits that it cannot. If this was the case, Washington would be free to impose a use tax on the value of a reservation Indians' clothes and boots if such were worn off the reservation. This would create economic barriers for Indians desiring to occasionally venture off the reservation. Respondent submits that the federal trust relationship continues when a reservation Indian temporarily ventures off his reservation. Therefore, the general use tax Washington seeks to impose is pre-empted by the continuing federal relationship. This was the basis for the holdings in *Moe* and *Colville.* There is nothing this case can present which will give this Court an opportunity to expand law beyond that which exists in *Moe* and *Colville.*

Finally, Washington points to *Sullivan v. United States,* 395 U.S. 169 (1969) to support the argument that sales and use taxes are different from recurring excise and property taxes and therefore, come within the *Colville* statement set forth above. *Sullivan* dis-

cussed the conceptual difference between the two forms of taxation *only* as it related to certain tax exemptions found in the Soldiers' and Sailors' Civil Relief Act. This legislation was intended to prevent military personnel from having to pay state property taxes in more than one state. Military personnel were not exempted from general sales or use taxes by the Act. This Court held the use tax in question in *Sullivan* could not be classified as a property tax from which military personnel were exempt.

This Court's opinion in *Sullivan* does not shed any light on the question of whether reservation Indians may be subjected to a use tax for occasional off-reservation use of personal property. The Court of Appeals in its opinion properly dispensed with Washington's argument regarding *Sullivan*. The Court of Appeals stated:

> "The Department further contends, however, that *Colville* can be distinguished because *Colville* involved an excise tax, while this case involves use tax. For authority the Department relies on *Sullivan v. United States*. *Sullivan* involved an interpretation of section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 USCA App. §574, which exempts military personnel from certain state taxes. We believe *Sullivan* is inapposite. First, *Sullivan* did not involve the unique issue of state taxation over Indians. Moreover, as we read *Sullivan*, that case merely draws a distinction between a use tax and a property tax, not between an excise tax and a use tax. *Sullivan v. United States*. Generally, use taxes have been considered as a form of excise tax. 68 Am.Jur.2d *Sales and Use Taxes* §172

(1973). Further, the Department's argument would seem to be directly contrary to the Supreme Court's admonition in *Colville* that "something more than mere nomenclature" must be varied. Accordingly, *Colville* controls the disposition of this case. (case citations omitted, 28 Wn. App. 69-70).

V.

CONCLUSION

The petition for writ of certiorari does not merit the granting of the writ. The question presented by this case has been thoroughly examined by this Court twice previously. For the reasons and authorities stated above, respondent requests the writ be denied.

Dated this 5th day of October, 1981.

Respectfully submitted,

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